No. 91-1615

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JESSE TURNER, *et al.*,

Appellants,

v.

THE STATE OF ARKANSAS, *et al.*,

Appellees.

On Appeal From The United States District Court, Eastern District Of Arkansas, Western Division

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APPELLANTS' BRIEF OPPOSING APPELLEES' MOTION TO AFFIRM

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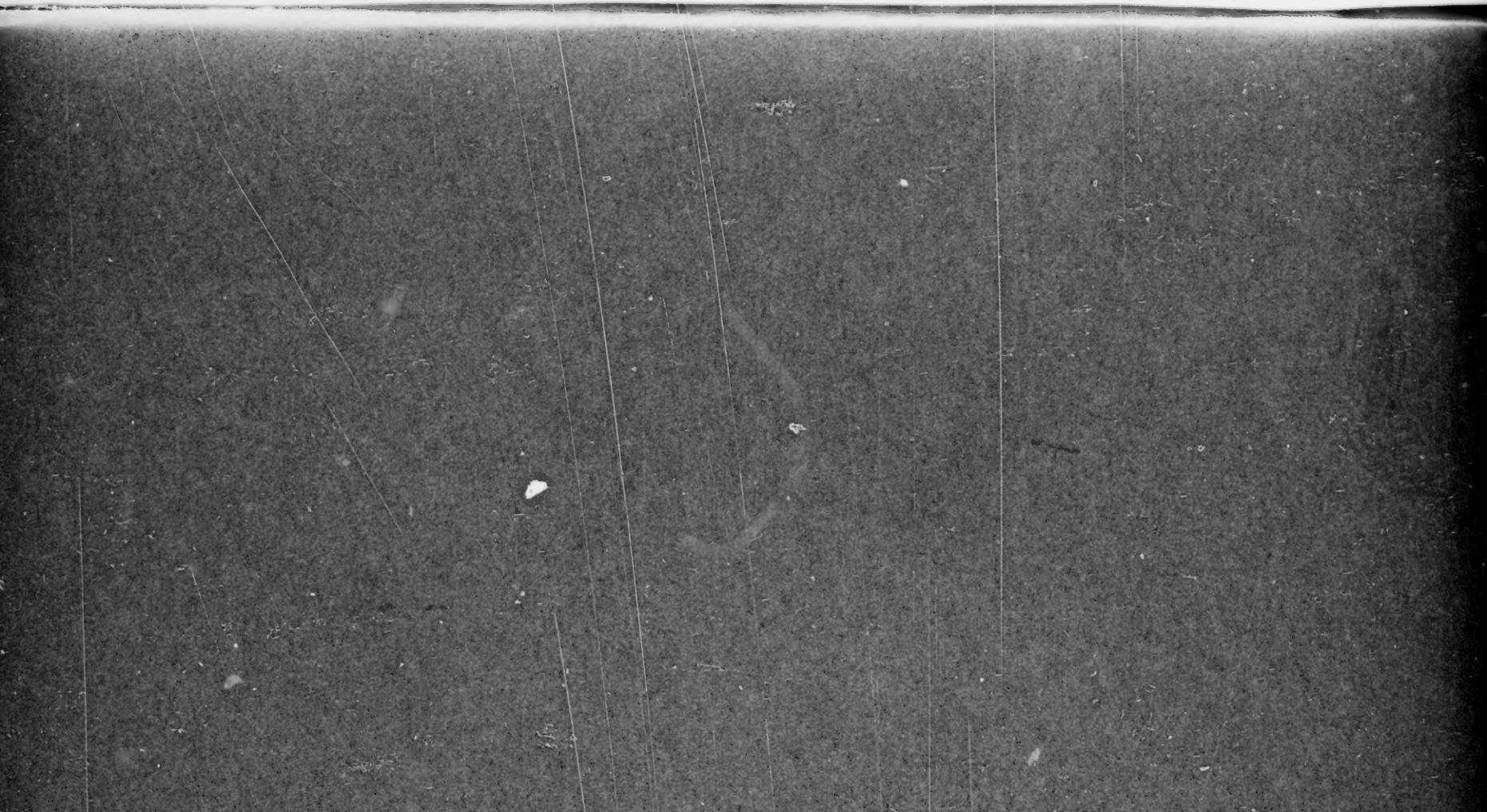

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Pursuant to Rule 18.8 of the Rules of this Court, appellants, Jesse Turner, *et al.*, submit this brief opposing the Motion to Affirm ("Motion") filed by appellees, the State of Arkansas, *et al.*, on May 8, 1992. The Motion requests that this Court affirm summarily the judgment of the court below, which is now reported at 784 F. Supp. 553, granting summary judgment against appellants' Voting Rights Act and constitutional claims.

Appellants invite the Court's attention to the following points:

1. The central theme of appellees' argument is that this case should be affirmed summarily because the decision below is supported by "firmly established legal principles in voting rights jurisprudence" and appellants' arguments are "insubstantial." Motion at 3. To the contrary, this case presents an exceedingly important unresolved question under the Voting Rights Act: whether the standards established by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986) ("*Gingles*"), apply to claims under § 2 by a minority group that is not sufficiently large and compact to constitute a majority in a single-member district in a challenge to the redistricting of *single-member* voting districts. *See Turner* v. *Arkansas*, No. 91-1615, juris. statement at 13 (U.S. filed Apr. 8, 1992). As appellants have demonstrated, the lower federal courts have issued contradictory and irreconcilable decisions on that fundamental question. *See id.* at 12-16.

Appellants' contention that the question presented by this appeal is certain to recur, especially in light of the number of jurisdictions throughout the nation presently engaged in decennial redistricting, *see id.* at 13, has proven to be accurate. In fact, three cases now pending before the Court present, albeit obliquely, variations of that same difficult question. In *Gardner* v. *Ryan*, No. 91-1655, cert. petition at 22 (U.S. filed Apr. 16, 1992), the petitioners, relying on *Chisom* v. *Roemer*, 111 S. Ct. 2354 (1991), assert that "[t]his Court, subsequent to *Gingles*, made clear that § 2(b) of the Voting Rights Act was intended to apply to 'influence' districts as well as single member districts in which the protected minority population is a majority of the district population." In *Voinovich* v. *Quilter*, No. 91-1618, juris. statement at 10a (U.S.

filed Apr. 8, 1992), a three-judge panel of the District Court for the Northern District of Ohio held that "*Gingles*' preconditions are not applicable to the apportionment of single-member districts and claims of dilution of minority influence districts at issue here." And in *Growe* v. *Emison*, No. 91-1420, juris. statement at 16 (U.S. filed Mar. 6, 1992), the appellants contend that the § 2 claim at issue fails because, "[w]ith respect to the first *Gingles* precondition, it is not possible to draw a geographically compact House or Senate district in Minnesota in which members of a single minority group would constitute a majority of the voting age population of the district."

This case, however, presents a more jurisprudentially suitable occasion than *Gardner*, *Voinovich* or *Growe* for this Court to address the applicability of the *Gingles* preconditions to claims involving single-member districts. First, that question was the central issue of the district court's opinion in *Turner* and is the primary focus of this appeal. In comparison, the Illinois Supreme Court opinion to which the *Gardner* petitioners seek a writ of certiorari does not even mention the Voting Rights Act by name, instead concluding summarily that the Illinois redistricting plan "provides adequate representation to minorities . . . to satisfy . . . United States constitutional rights as well as Federal statutes." *See* No. 91-1655, cert. petition at 20. The appellants in *Voinovich* do not even raise the question in their jurisdictional statement. Although appellants in *Growe* do present arguments concerning the question, see No. 91-1420, juris. statement at 15-17, it is not articulated as a question presented, it may not be necessary to address that question in *Growe*, and is clearly subor-

dinate to the principal contention in *Growe* that the district court's failure to defer to the state court in a case challenging a state legislative redistricting plan raised important questions of federalism. Moreover, the district court in *Growe* completely failed to address the issue in its opinion.

Second, both *Voinovich* and *Growe* involved claims that the state legislature violated § 2 by engaging in "packing," *e.g.*, concentrating an excessive number of minority voters in a supermajority minority district, thus diluting minority voting strength in surrounding districts in which minority voters might have influenced elections. *Turner*, on the other hand, involves a true "influence" claim, *e.g.*, a § 2 claim brought by members of a minority group whose members are not sufficiently numerous to constitute a majority in a single-member district.

Thus, this case, unlike any other case currently pending before the Court, clearly and directly presents and thoroughly addresses the question this Court expressly reserved in *Gingles*: "[W]hat standards should pertain to [ ] a claim brought by a minority group[] that is not sufficiently large and compact to constitute a majority in a single-member district . . .[?]" 478 U.S. at 46 n.12. For those reasons, this Court should note probable jurisdiction in *Turner* and perhaps defer *Gardner*, *Voinovich* and *Growe* for resolution in accordance with its opinion in this case.

2. Appellees' characterizations of House Bill 2071, the redistricting plan favored by appellants, as the "plan supported by the small Republican delegation" (Motion at 2) and the "Republican-backed plan" (Motion at 2) are misleading. House Bill 2071 was, in fact, sponsored in the Arkansas Assembly by Rep-

resentative Ben McGee, a Democrat and a member of the Black Legislative Caucus ("BLC"). During the debate on redistricting, both Representative McGee and Representative William Walker, Jr., also a Democrat and a member of the BLC, argued that other plans fragmented black voting strength and that black citizens would have greater opportunity to participate in the political process under House Bill 2071. *See Transcript of Hearing Before the Redistricting Subcommittee of the House State Agencies Committee* 128-38 (Mar. 12, 1991). Every black member of the Arkansas General Assembly is either a plaintiff or a plaintiff-intervenor in this case. Appellants are a class consisting of *all* black voting-age citizens residing in Arkansas' First, Second and Fourth congressional districts.

3. In *Chisom*, 111 S. Ct. at 2368, this Court directed that the Voting Rights Act "should be interpreted in a manner that provides 'the broadest possible scope' in combatting racial discrimination." *Id.* at 2368 (quoting *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 567 (1969)). Thus, the Court held that "[the] task [of applying the 'totality of circumstances' described in § 2(b) of the Act], difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress." *Ibid.* Appellees ignore *Chisom* entirely, and, contrary to the Court's admonition in that case, urge the Court summarily to affirm the decision of the court below that a minority group not sufficiently numerous to constitute a majority in a single-member district cannot state a claim under § 2. *See* Motion at 2-3. That "judicially created limitation on the coverage of the broadly

worded statute" is inconsistent with the language and intent of Congress. In no event should such a limitation become the law without briefing, argument and the most plenary consideration by this Court.

4. Appellees misstate the law when they assert that the district court "[drew] upon a body of case law which *invariably* has held that ['influence'] claims like the appellants['] cannot be brought under the Voting Rights Act." Motion at 2 (emphasis added). In *West* v. *Clinton*, No. 91-2237 (W.D. Ark. Mar. 12, 1992), the court considered the question "whether there can be such a thing as an influence claim under Section 2," and concluded that "[t]here is authority pointing both ways." Slip op. at 6. Appellants' Jurisdictional Statement contained references to and a discussion of those authorities on either side of this issue. See *Turner*, No. 91-1615, juris. statement at 15-16. Appellees have largely ignored that discussion.

5. Appellees concede that *Gingles* did not resolve the issue presented by this appeal. Motion at 3 n.2 (citing *Gingles*, 478 U.S. at 46 n.12). They assert, however, that "the [*Gingles*] threshold test logically could be, should be, and has been extended to cover both types of claims." Motion at 3 n.2. While the *Gingles* test has been applied to cover both types of claims (*see, e.g.*, *Brewer* v. *Ham*, 876 F.2d 448 (5th Cir. 1988); *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989)), whether it *should* be extended to cover claims such as those presented here is an entirely different question. Appellees do not supply any basis for extending the *Gingles* standard to the facts presented here beyond their *ex cathedra* assertion. Because this rule would narrow dramatically the relief available to most

minorities under § 2 of the Voting Rights Act, it should certainly not be adopted through the medium of a summary affirmance.

6. Appellees grievously mischaracterize this case by stating that "[a]ppellants here ask the court to speculate that the plan they propose *might* help a black candidate get elected." Motion at 5. Appellants take no such position. They have pleaded and have offered persuasive evidence that the redistricting plan adopted by Arkansas intentionally produces a significant dilution of black voting strength in Arkansas. They seek the protection of the Voting Rights Act to avoid diminution of their opportunity to participate in the political process and to influence the election of candidates *of their choice*. They have offered evidence, not speculation, and their claim is not limited to "black" candidates, but, in the words of the statute, to "elect representatives of their choice." 42 U.S.C. § 1973(b).

7. Appellees assert that "[i]f any influence claim can be brought under Section 2, surely it must be a minimum pleading requirement that the challenged plan dilutes black voting strength in some manner so that black influence is diminished." Motion at 7. But that argument overlooks both the actual pleadings in this case and its procedural posture as it comes to this Court. First, the complaint plainly states that the "Voting Rights Act has been violated [because] the congressional district boundaries have been drawn to dilute black voting strength and [the plan adopted] has the effect or result of giving the black citizens of this State less opportunity than other members of the electorate to elect representatives of their choice." *Turner*, No. 91-1615, juris. statement at 91a. This

was ample notice of the nature of appellants' claim. Second, both appellants and intervenors fully developed the nature and contours of the Voting Rights Act claim prior to summary judgment. There is no doubt whatsoever that the litigants and the court below understood the contentions of the parties. This case does not present an issue of pleading requirements.

8. Appellees argue that "[p]roof of intent, direct or circumstantial, is an absolute requirement to finding a constitutional violation in this case." Motion at 9. But appellants contended and offered evidence to establish that the General Assembly—knowing that the redistricting plan that the court imposed in *Doulin* v. *White*, 535 F. Supp. 450 (E.D. Ark. 1982), fragmented black voting strength among the First, Second and Fourth Congressional Districts—intentionally perpetuated that fragmentation in an effort to ensure reelection of incumbent congressmen. Whether the Assembly engaged in such intentional discrimination for political reasons rather than "any dislike, mistrust, hatred or bigotry against [the] minority group" does not shield appellees from voting rights challenges because "elected officials engaged in the single-minded pursuit of incumbency can run roughshod over the rights of protected minorities." *Garza* v. *County of L.A.*, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part), *cert. denied*, 111 S. Ct. 681 (1991). In any event, the court below dismissed appellants' action not because their proof was inadequate but because the court found legal impediments to their claim. It is those legal barriers that are at issue here, not the amount or quality of appellants' evidence of intentional discrimination.

9. Appellees assert that any contention that Act 1220 is racially discriminatory must imply that the district court plan in *Doulin*, 535 F. Supp. 450, which provided a pattern for the boundaries drawn by Act 1220, also was racially discriminatory. See Motion at 10. Appellees then argue that because "the District Court did not impose a racially discriminatory plan in *Doulin*," Motion at 10, Act 1220 therefore cannot be discriminatory. However, the *Doulin* court was only interested in numerical equality and not racial discrimination. Appellees' contention, and the rationale of the court below that any boundaries based on *Doulin* must *a fortiori* survive scrutiny under the Voting Rights Act, are *non sequiturs*. See, *e.g.*, *Growe*, No. 91-1420 (district court held that Minnesota state legislative redistricting plan violated § 2 even though it, like court-imposed plan established in *LaComb* v. *Growe*, 541 F. Supp. 160 (D. Minn. 1982), contained districts of minority concentration).

CONCLUSION

This case presents important unresolved issues under the Voting Rights Act that should be considered and resolved by this Court.

May 18, 1992

Respectfully submitted,

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